

**BEFORE THE  
COMMISSION ON COMMON OWNERSHIP COMMUNITIES  
FOR MONTGOMERY COUNTY, MARYLAND**

In the Matter of

G. Ulysses Flores  
3334 Buehler Court  
Olney, MD 20832

Complainant

v.

Highlands of Olney Condominium  
c/o Brian Bichy, Esquire  
Chadwick, Washington, *et al.*  
7979 Old Georgetown Road  
Bethesda, MD 20814

Respondents

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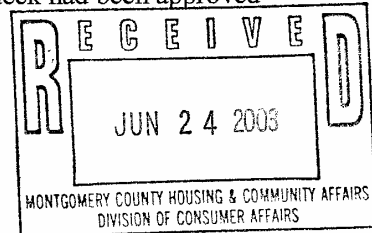
Case # 553- O

**DECISION AND ORDER**

The above-captioned case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing on August 21, 2002 pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended, and the duly appointed Hearing Panel, having considered the testimony and evidence of record, finds, determines, and orders as follows:

**Background & Summary of Testimony and Evidence**

Mr. Flores filed Complaint # 553-O against Highlands of Olney Condominium Inc. (Highlands) with the Commission on December 19, 2001. By a letter dated December 11, 2001 Highlands had ordered Mr. Flores to remove a hot tub, pathway lighting, a lattice addition to his fence, canvas material attached to the fence, and a deck located in the rear corner of his property, because each feature had been installed without the prior written approval of the Board of Directors as required by Article V, Section 7 of the Highlands Bylaws. In his complaint, Mr. Flores contended that the hot tub should be permitted because he uses it as part of treatment for an injury to his leg, that he had not installed the pathway lights as alleged, that the lattice was not present, that the canvas material was necessary to provide shelter for his dogs, as required by Montgomery County Code provisions for animal control, and that the deck had been approved when it was built six years ago.



Mr. Flores asked the Commission to “confirm” his defenses and explanations. The Commission interprets Mr. Flores’s request as asking the Commission to rule that the matters raised in the December 11, 2001 letter from the Highlands are not violations of the Highlands By-laws in light of the evidence he has submitted.

Subsequently, Highlands’ legal counsel, Brian Bichy, Esquire, filed a response to the complaint on February 6, 2002. In his response, Mr. Bichy further explained Highlands’ contention that the hot tub, canvas, and deck had been installed without the approval required by the By-laws. He noted Mr. Flores’ failure to provide the Board with documentation regarding the medical necessity for the hot tub. He stated that if Highlands were permitted to confirm that the pathway lighting and lattice are not in place, Highlands would take no further action. He acknowledged that the Highlands Board had approved an application to build the deck in August 1995 and stated that Highlands would not pursue the removal of the deck. Additionally, Mr. Bichy requested that the Commission dismiss the dispute because Mr. Flores had filed the dispute before the Highlands Board had held a hearing on the matter, and he characterized Mr. Flores as not having met the requirement of Section 10B-9(b) of the Montgomery County Code to make a good faith attempt to exhaust all procedures or remedies provided in the Highlands governing documents.<sup>1</sup>

The complaint was not resolved through mediation, and the dispute was presented to the Commission on Common Ownership Communities, which voted that the dispute involved matters within the Commission’s jurisdiction and scheduled the dispute for hearing.

Mr. Flores testified that he experiences pain in his leg as a result of an earlier trauma. He exhibited his leg to the Panel, to show a large scar as evidence of the trauma. He explained that he used the hot tub to relieve the pain in his leg and to aid in the recovery from the trauma. He introduced a letter dated August 20, 2002 from two chiropractors, Drs. Raymond and Gabriella Moss, in which the doctors stated, “The use of a hot tub would benefit Mr. Flores’ current condition. Combining thermal treatment and massage via a hot tub will significantly aid Mr. Flores in maintaining a pain free lifestyle.” See Complainant’s Exhibit #2. In response to a

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<sup>1</sup> Subsequent to the filing of the complaint and the response, a hearing on the matters raised in the December 11 letter was held before the Highlands Board of Directors, on April 25, 2002. Mr. Flores appeared at the Board’s hearing on the violations referenced in this dispute. The Panel notes that the December 11 letter from the Highlands advises Mr. Flores that the Board would schedule a hearing on the violations, but also advises him that he has the right to file a dispute with the Commission. Based on this letter, it was not unreasonable for Mr. Flores to conclude that he could file the dispute before the Board’s hearing. Thus, the Panel views Mr. Flores’s failure to exhaust the Highlands dispute resolution procedure as having been cured. By letter dated May 8, 2002, Highlands notified Mr. Flores that following the April 25 hearing, the Board had again concluded that Mr. Flores was in violation of the covenants with regard to the hot tub, pathway lighting, lattice, and canvas dog shelters, and that Highlands would take no further action pending resolution of Case #553-O. Consistent with the response to Case 553-O filed on February 6, 2002, the May 8 letter does not identify the deck as a violation. Although the sequence of the filing of Highlands’ notice of violation to Mr. Flores, Mr. Flores’ filing of this dispute, and scheduling of the Highlands Board of Directors hearing on April 25, 2002 raises issues about both parties’ compliance with Section 10B-9 of the Montgomery County Code, there is no indication that either party acted in bad faith, or to intentionally create additional expense or delay for the other party. The Panel therefore concludes that the parties acted consistently with the purposes of Chapter 10B, if not in strict compliance with Chapter 10B-9, and because the sequence of events had no material procedural or substantive effect on either party, it was in the interest of both parties and administrative efficiency for the Panel to complete the hearing and reach a decision in this dispute.

question from Commissioner Leeds, Mr. Flores indicated that he was aware of the availability of hot tub facilities at local exercise clubs. He described the appearance and dimensions of the hot tub, and said that it was portable, not attached to permanent water or drainage lines.

Mr. Flores testified further that the pathway lighting and lattice did not exist on the property. He testified that he had attached the canvas to the fence in his back yard in order to comply with Montgomery County's requirements for shelter for his dogs, which he prefers to keep outside. He testified that the temperature on the deck is often much higher than the general ambient temperature. He introduced pictures of the shelters. See, e.g., Complainant's Exhibit #3.

Montgomery County Department of Animal Control Officer Alberti testified that the shelters met the County's requirements for protecting the dogs from rain and sun.

Rosemary Webster, the president of the Highlands Board of Directors testified that the Board of Directors had reviewed and denied an application submitted by Mr. Flores in 1999 to place the hot tub, lattice and pathway lighting on the property and denied the application. She testified further that the Board's reason for denying the application was that the proposal was not in harmony with the character of the community, in accordance with the Association's Architectural Control Committee Guidelines, Section I. She testified that according to a review of the Association's records, no hot tubs have been approved by the Board of Directors within the Condominium, and in the Board of Directors' judgment, the installation of a hot tub would thus be inconsistent with the harmony of the community. Additionally, she testified that the Board considered Mr. Flores' request that the hot tub be permitted in light of his medical condition, but that Mr. Flores failed to submit medical reports or documentation sufficient to support his claim that the hot tub was a medical necessity. She confirmed that the canvas were visible above the top of the fence at Mr. Flores' property.

Mr. Bichy cited Article V, Section 7 of the Highlands Bylaws, as authority for the Board to review and approve the hot tub, the canvas dog shelters, the lattice and the lighting.

The parties agreed to meet to inspect the property to determine whether the lattice and lighting remained as issues.

Other exhibits in the record included the Commission's file on this dispute, including the Highlands governing documents, records of the Board of Directors meetings noted above, Mr. Flores' 1999 application for permission to install the hot tub, lattice and pathway lighting, and a letter dated April 1, 2002 from Dr. Frank Lin stating that "perhaps the use of a warm tub may of some benefit" to Mr. Flores, and later that it "... would be of some benefit to him from a medical standpoint."

### **Findings of Fact**

1. The Property is subject to the Master Deed dated August 16, 1972 recorded among the Land Records for Montgomery County, Maryland at Liber 4267, Folio 779, applicable to the Highlands of Olney Condominium Association, and decisions of the Board of

Directors made pursuant to the Association's By-Laws, as referenced therein and amended from time to time.

2. Article V, Section 7 of the Highlands By-laws provides in pertinent part as follows:

Additions, Alterations or Improvements by Owners. No Owner shall make any structural addition, alteration or improvement in or to his Unit without the prior written consent of the Board of Directors. No Owner shall paint or alter the exterior of his Building, including the doors and windows, or any fence, nor shall an Owner erect a fence on his property, without the prior written consent thereto of the Board of Directors. The Board of Directors shall be obligated to answer any written request by an Owner for approval of a proposed structural addition, alteration or improvement (by painting or otherwise) in such Owner's Unit within forty-five (45) days after such request, and its failure to do so within the stipulated time shall constitute a consent by the Board of Directors to the proposed addition, alteration or improvement. . .

3. The Rules and Regulations for the Highlands of Olney Condominium Association, at Section I of the Architectural Control Committee Guidelines provide that :

No building, accessory building or structure, shed, awning, porch. or porch covering, garage, trailer, tent, driveway, back fence, hedges, screens, barns, wall or other structures shall be allowed, constructed or altered upon any townhouse or property in the development therein without the plans and specifications of such having been approved by the Architectural Control Committee as to qualify of workmanship, design, color and material and harmony of same to the development as a whole. No structure in the development shall have the exterior painted without the proposed color having been approved by said Architectural Control Committee.

4. A portable hot tub and canvas attached to and extending above the fence on Mr. Flores' property were present on the property at times relevant to the dispute and as of the date of the Commission hearing.

5. On April 15, 1999 the Highlands Board of Directors denied an application submitted by Mr. Flores, which requested permission to place the hot tub and associated pathway lighting and lattice on the property.

6. There are no records of Highlands having approved installation of hot tubs on the exterior of other properties subject to the Highlands Declaration of Covenants.

7. There is no record of an application having been submitted requesting permission for placing the canvas dog shelters on the Property

8. Mr. Flores has provided two letters from physicians who opine that use of a hot tub would aid Mr. Flores.

9. Highlands' response to Mr. Flores' complaint acknowledges that the deck in Mr. Flores' yard was approved by the Board of Directors in August, 1995, and Highland's letter to Mr. Flores dated May 8, 2002 does not identify the deck as a violation.

### **Conclusions of Law & Discussion**

The Panel concludes that the Highlands Board of Directors' orders to Mr. Flores in its letter dated December 11, 2001 and as modified and ratified in its letter dated May 8, 2002 are based on the Board's reasonable interpretation of the Highlands Master Deed, By-laws and Rules and Regulations.

The Panel concludes that Mr. Flores did obtain permission to build the deck on his property in 1995, based on Highlands' admission in its Response to Mr. Flores' complaint.

*Kirkley v. Seipelt*, 212 Md. 127, 133 (1957), explains that covenants are in essence a contract, which the parties enter voluntarily, and if the intention of the parties is clear and the restrictions in the covenants are reasonable, they must be upheld. The standard in evaluating a Board of Directors' refusal to approve a proposal subject to an architectural covenant is that "... any refusal to approve the external design or location . . . would have to be based on a reason that bears some relation to the other buildings or general plan of development; and this refusal would have to be a reasonable determination made in good faith, and not high-handed, whimsical or captious in manner." *Id.*

The parties agreed that no Board approval had been obtained to install a hot tub, lattice, lights, or canvas dog shelters on Mr. Flores' property. Therefore, installation of all or any of these items would be a violation of the requirement from Article V, Section 7 that approval from the Board of Directors be obtained prior to installation. The only question before the Panel is therefore whether the Board of Directors' decision to deny Mr. Flores' application is a reasonable interpretation of the restrictions set forth in the Highlands Master Deed, By-laws and Rules.

As noted above, the Rules require that a determination be made of whether a proposal is in "harmony . . . to the development as a whole."

The Board considered the hot tub, lights and lattice as an integral proposal. With regard to determining whether the tub, lights, and lattice would be in harmony with the community, the Board focused on whether there were other hot tubs in the community. While a proposal could be in "harmony" with the community as a whole, even if the proposal were unique, it is not unreasonable to consider whether a proposal stands out from uses on other properties in

determining whether it would be in harmony with them. In this dispute, the Board determined that Mr. Flores' hot tub would be unique in the community, and in the Board's determination, it was not in harmony with the development because it would have been uniquely different from the uses and structures on other properties in the Highlands of Olney. The Panel concludes that the Board's decision is a reasonable interpretation of the applicable Master Deed, By-law, and Rules provisions.

Testimony and evidence in the record are inconclusive as to whether the lights and lattice were ever installed, or are already removed from the property. In any event, no approval for them was obtained, and the Panel upholds the Board's decision and order to remove them if present on the property.

Although there is no provision in the By-laws or Rules for a waiver of the requirement that the Board find a proposal to be in harmony with the other properties in the community, the record establishes that the Board weighed Mr. Flores' request in light of his argument that the hot tub provided a medical benefit to him. The Board ruled that Mr. Flores did not provide evidence upon which the Board could conclude that the hot tub was a medical necessity for Mr. Flores' condition, sufficient to override its determination that the hot tub is not in harmony with the community. Without reaching a decision as to whether the Highlands Board has the power or obligation to consider such a waiver, the Panel notes that the letters produced by Mr. Flores established that he would receive a therapeutic benefit from using the hot tub. They did not establish that use of the hot tub was a *medical necessity*. Additionally, Mr. Flores did not establish that he could not obtain the benefits of a hot tub inside his home or through another facility.

Mr. Flores did not submit a proposal for the canvas dog shelters. In its Response to Mr. Flores' Complaint, the Board asserts that attaching the canvas to the fence is a structural addition or exterior alteration to the exterior of the unit that requires approval under Article V, Section 7 of the By-laws. Evidence in the record shows that the canvas is visible from adjacent property above the top of the fence on Mr. Flores's property, that the canvas is several square feet in area, and is blue-green in color. Because the canvas and its supports are an assembly of materials, attached to the existing exterior features of the property, and its visual effect is similar in some ways to the effect that painting would have, the Board's characterization of the installation of the canvas as a structural addition or exterior alteration is reasonable. Although the Board did not articulate its analysis of whether the canvas is in harmony with the community, the Panel concludes that Board approval was not obtained in compliance with Article V, Section 7 of the Bylaws, and upholds the Board's order to remove the canvas.

Mr. Flores contends that the Highlands' authority to order him to remove the canvas is subordinate to Montgomery County law requiring him to provide shelter for his dogs. Mr. Flores is incorrect in his understanding of the relationship between County law and the Highlands governing documents. He must comply with both, and County law does not relieve Mr. Flores from his obligation to obtain written approval prior making a structural addition or exterior alteration.

The Panel does not dispute that Montgomery County law requires Mr. Flores to provide his dogs with shelter. However, Montgomery County law does not require Mr. Flores to attach canvas material to his fence in order to provide such shelter. Mr. Flores has the option of keeping his dogs inside to protect them from extreme heat, cold, or rain. If Mr. Flores prefers to let the dogs remain outside during the day, which requires some form of shelter, he must exercise his preference within the standards established by the Highlands in accordance with its Master Deed, By-laws and Rules.

Nothing in the record indicates circumstances which would warrant the return of the filing fee in this dispute, and the Panel therefore denies Mr. Flores' request for its return.


### ORDER

Based upon the evidence of record and for the reasons set forth above, it is this 23<sup>rd</sup> day of June, 2003 by the Commission on Common Ownership Communities

1. ORDERED, that except as to confirmation that the deck at 3334 Buehler Court was built pursuant to approval of the Board of Directors of Highlands of Olney Condominium Association on August 19, 1995, the Complaint in case number 553-O is DENIED, and the relief requested is also DENIED; and it is further
2. ORDERED that the Complainant remove any hot tub, lighting, lattice, and canvas dog shelters as further described in letters dated December 11, 2001 and May 8, 2002 to the Complainant from the Respondent, within 45 days following the date of this Order.

Panel members Hitchens and Leeds concurred in this decision. Panel member Guynn-Werking participated in the hearing, but resigned from the Commission prior to the issuance of this order.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland within thirty days after this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.

  
Christopher Hitchens  
Panel Chair  
Commission on Common  
Ownership Communities